

Fwd: Re: Notification under s50 PID Act 2013 re your Public Interest Disclosure [SEC=OFFICIAL:Sensitive]

Annexure EDR - 17

----- Original Message -----

From:

To:

PID@apsc.gov.au

Sent:

Fri, 07 Aug 2020 21:33:53 +0800

Subject:

Re: Notification under s50 PID Act 2013 re your Public Interest Disclosure
[SEC=OFFICIAL:Sensitive]

Dear Ms McMullen,

Thank you for your email.

Unless I have misunderstood your email, you have informed me, pursuant to paragraph 50(1) (a) of the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), that you are required to investigate the disclosure that was allocated to the Australian Public Service Commission (**APSC**) on 11 May 2020 by an authorised officer of the Commonwealth Ombudsman. Pursuant to subsection 50(1A) of the PID Act, you have informed me that the estimated length of the investigation will be 180 days.

In your email you note that you are, at this time, unable to provide me with any other information about the investigation of my disclosure. I take issue with that comment. I set out my reasons and concerns in the email below.

1. Initial information for disclosers

Your email of 29 July 2020 is the first communication that I have received from anybody at the APSC in respect of my disclosure, which does not necessarily mean that somebody at the APSC has not attempted to contact me about my disclosure.

Subsection 9(1) of the *Public Interest Disclosure Standard 2013* (Cth) (**PID Standard**) requires the principal officer of the APSC, or his delegate, to provide a discloser with information about the principal officer's powers to:

- a) decide not to investigate the disclosure made; or
- b) decide not to investigate the disclosure further; or
- c) decide to investigate the disclosure under a separate investigative power.

Subsection 9(2) of the PID Standard requires the principal officer of the APSC, or his delegate, to provide the information in subsection 9(1) of the PID Standard to the discloser within fourteen days after the disclosure is allocated to the APSC, if it is practicable to do so.

I note that the information to be provided is not about the exercise of the principal officer's powers in respect of the particular disclosure made; rather, it is about the powers available to the principal officer, generally, and what the principal officer is permitted to do. As I understand section 9 of the PID Standard, the information that ought to be provided to disclosers is generic in nature and not tied to any particular disclosure.

I acknowledge that it is possible that an email was sent to my email address with information about the principal officer's powers to:

- a) decide not to investigate the disclosure made; or
- b) decide not to investigate the disclosure further; or
- c) decide to investigate the disclosure under a separate investigative power.

If an email was sent, I have, regrettably, not received the email. I would be grateful if you could please forward a copy of that email to me.

If information, pursuant to section 9 of the PID Standard, was not sent to me, I would be grateful if you could confirm whether you agree with my interpretation of section 9 and, if so, explain why the information was not made available to me. I would also like to be provided with the information pursuant to section 9 of the PID Standard.

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If you disagree with my interpretation of section 9 of the PID Standard, I would like to understand why you have formed that view. I would be grateful for an explanation.

2. Notification to discloser under subsection 50(1) of the PID Act

Subsection 50(1) of the PID Act reads:

The principal officer of an agency must, as soon as reasonably practicable, inform the discloser of the following (whichever is applicable):

- (a) that the principal officer is required to investigate the disclosure;
- (b) that the principal officer has decided under section 48 or 49 not to investigate the disclosure under this Division, or not to investigate the disclosure further.

As I mentioned earlier, your email of 29 July 2020 is the first communication that I have received from anybody at the APSC in respect of my disclosure. Thus the first communication that I received from anybody at the APSC in respect of my disclosure was a communication received on the 79th day after the disclosure was allocated to the APSC by an authorised officer of the Commonwealth Ombudsman.

Am I to understand that the soonest reasonably practicable moment for notification under subsection 50(1) of the PID Act was on the 79th day after the disclosure was allocated to the APSC, especially in light of the fact that investigations under Part III, Division 2 of the PID Act must, pursuant to subsection 52(1), be completed within 90 days after the relevant disclosure was allocated to the agency concerned? While you claim that you 'are unable to provide [me] with any other information about the investigation of [my disclosure] at this time', I do not think it would be unreasonable on my part to request an explanation as to why the soonest reasonably practicable moment for notification under subsection 50(1) of the PID Act was on the 79th day after the disclosure was allocated to the APSC. I would like an explanation.

3. A summary of the progress made with this investigation

The law, PID procedures and best practice guidelines

Subsection 52(1) of the PID Act provides that an investigation under Part III, Division 2 must be completed within 90 days of the disclosure being allocated an agency which, in this case, is the APSC. Pursuant to subsection 52(3) of the PID Act, an application for an extension of time may be made by the principal officer of the APSC, or his delegate, to the Commonwealth Ombudsman.

According to clause 8.3 of the APSC Public Interest Disclosure Procedures (**APSC PID Procedures**), issued pursuant to section 59 of the PID Act by the Australian Public Service Commissioner on 21 September 2018, '[a] request to the Ombudsman for an extension of time should be made where an investigation has not been completed within 70 days of the date the disclosure was allocated'. Moreover, clause 8.3 of the APSC PID Procedures provides that '[a]n application for extension should include reasons why the investigation cannot be completed within the time limit, the views of the discloser and an outline of action taken to progress the investigation'.

According to clause 9.1.4 of the *Agency Guide to the Public Interest Disclosure Act 2013* (**Agency Guide**), a document that 'has been developed to assist Commonwealth Agencies fulfil their obligations under the [PID Act] and [PID Standard]', '[a]gencies should lodge an application for an extension of time to investigate well before the end of the 90 days where it is likely or known that the investigation will not be completed within the time limit'. Further into clause 9.1.4, the following is noted:

Agencies are encouraged to let the discloser know before they apply for an extension, and take the opportunity to explain why it is required and the steps that need to be taken to complete the investigation ...

The Ombudsman will not automatically grant an application for an extension ... The Ombudsman will take into account a range of other factors including the availability of witnesses; the complexity of the investigation; the action already taken to progress it; and whether there have been any unreasonable or unexplained delays on the part of the agency. The Ombudsman will also take into account any views expressed by the discloser about the requested extension ...

If an extension is not granted, the agency is still required to complete and prepare a report. However, if that is not completed before the relevant time limit (i.e. 90 days, or such longer period was previously granted by the Ombudsman or IGIS) the discloser may be entitled to make an external disclosure under the PID Act ...

Clause 7.5.1 of the Agency Guide reads as follows:

A discloser can easily become concerned or dissatisfied if they feel they are being left in the dark or that nothing is happening. The PID Act requires the discloser to be notified at various stages in the process, provided the person's contact details are available. The discloser must be advised:

- when the disclosure is either allocated for investigation, or not allocated because it has been determined not to be an internal disclosure

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- of information about the principal officer's discretionary powers to not investigate within 14 days of the disclosure being allocated (s 9 of the PID Standard)
- if the agency decides to investigate
- if the investigation is under the PID Act, the estimated length of the investigation
- if the agency decides not to investigate, the reasons for the decision and any action that might be available to the discloser under other Commonwealth laws
- if an investigation is conducted under the PID Act and an extension of time is granted by the Ombudsman or IGIS, the progress of the investigation
- after the investigation report is completed.

Apart from the legislative requirements, the agency should keep the discloser up to date with reasonable information on what is being done in response to their disclosure. Early in the process, an authorised officer should make sure the discloser understands:

- what the agency intends to do
- the likely timeframe for an investigation
- the discloser's responsibilities (such as maintaining confidentiality)
- how they will be updated on progress and outcomes
- who to contact if they want information or are concerned about reprisal

Any questions or concerns the discloser raises should be addressed honestly and as soon as possible. If they have not heard anything within a reasonable period, they are entitled to ask for an update.

The agency should also inform the discloser if it becomes apparent during the investigation that it is likely to take longer than originally expected. If an extension of the investigation time is required (see 9.1.4), the agency should inform the discloser before applying to the Ombudsman or IGIS and provide and provide an estimate of the date when the investigation will be completed.

Concerns

Firstly, agencies are encouraged to let the discloser know before they apply for an extension of time, and take the opportunity to explain why it is required and the steps that need to be

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taken to complete the investigation. I have not received any correspondence from the APSC advising me about an application for an extension of time. Nor have I been provided with explanation as to why an extension of time is required and what steps need to be taken to complete the investigation. On the contrary, and despite the recommendations of contained in the Agency Guide, I have been advised that you 'are unable to provide [me] with any other information about the investigation of [my disclosure] at this time'. Acknowledging that you are not required, under statute, to do so, I would like to know why you, or another appropriate officer at the APSC, chose not to follow the guidance in the Agency Guide and inform me that an application for an extension of time would be made.

Secondly, the APSC PID Procedures require the person requesting an extension of time from the Commonwealth Ombudsman to communicate the discloser's views on the application for an extension. Given that the person requesting an extension of time from the Commonwealth Ombudsman should have, in accordance with the APSC PID Procedures, communicated my views on any application for an extension of time, I would like to know why the person requesting an extension of time from the Commonwealth Ombudsman failed to comply with the necessary prerequisite to communicating my views on the application for an extension of time – namely, approaching me for my views prior to requesting an extension of time.

Thirdly, in respect of applications for an extension of time, the Ombudsman 'will take into account a range of other factors including the availability of witnesses; the complexity of the investigation; the action already taken to progress it; and whether there have been any unreasonable or unexplained delays on the part of the agency'. Since the first communication that I received from anybody at the APSC in respect of my disclosure was sent to me on 29 July 2020, and since I was advised, in that communication, that you 'are unable to provide [me] with any other information about the investigation of [my disclosure] at this time', I cannot form an informed opinion about the action, if any, taken to progress the investigation of the disclosure allocated to the APSC on 11 May 2020. Nor can I form an informed opinion about any unreasonable delays on the part of the agency.

Knowing that the 'Ombudsman will also take into account any views expressed by the discloser about the requested extension', I would like to know why there has been no attempt on your part, or the part of an appropriate officer at the APSC, to notify me about those factors, such as action already taken to progress the investigation, that would reasonably inform my views about any applications for an extension of time made to the Commonwealth Ombudsman. In other words, did you, or others at the APSC, expect me to express uninformed views about any application for an extension of time and, if you, or others at the APSC, did not expect me to express uninformed views, in the absence of information about the way you, or others at the APSC, have progressed the investigation, on what basis did you expect me to express my views about any application for an extension of time to the Commonwealth Ombudsman?

Fourthly, despite the existence of 'best practice' guidance in the Agency Guide, the manner in which the investigation process has been administered has demonstrably fallen short of the recommendations in the Agency Guide and the APSC PID Procedures (as evidenced in some of the concerns raised in the preceding paragraphs). I would like to know why you, and, if applicable, relevant officers at the APSC, have chosen to ignore the prescriptions in the Agency Guide and APSC PID Procedures with respect to the administration of the investigation of the disclosure made.

4. Concluding remarks

I feel that approach that has been taken to the investigation of my disclosure falls short of statutory, and best practice, standards. That is not to suggest that my perceptions of the approach that has been taken in investigating my disclosure are beyond criticism and I invite a response, whether by way of comment, clarification, explanation or rebuttal. Of course, a response would entail the provision of information, which would contradict the claim that you 'are unable to provide [me] with any other information about the investigation of [my disclosure] at this time' but I'm prepared to look past that.

In summary:

- I would like to be provided with information pursuant to section 9 of the PID Standard and, assuming that the information was not sent to me in the form of an email, and assuming that you agree with my interpretation of section 9 of the PID Standard, an explanation as to why the information was not made available to me according to the timeframe set in the PID Standard; and
- I would like an explanation as to why the soonest reasonably practicable moment for notification under subsection 50(1) was on the 79th day after the disclosure was allocated to the APSC given that investigations under Part III, Division 2 of the PID Act must, pursuant to subsection 52(1), be completed within 90 days after the relevant disclosure was allocated to the agency concerned; and
- I would like you to address the concerns raised in part 3 of this email.

Pursuant to clause 7.5.1 of the Agency Guide, I would like my questions and concerns addressed as soon as possible, and honestly. To that end, please ensure that your responses are as detailed as the circumstances warrant and are not vague, ambiguous, unclear, opaque, euphemistic etc. Please be candid and objective in your responses.

Sincerely,